

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-494

February 13, 2003

PUBLIC UTILITIES COMMISSION
Amendments to Eligible Resource
Portfolio Requirement Rule
(Chapter 311)

ORDER PROVISIONALLY
ADOPTING RULE AND
STATEMENT OF FACTUAL
AND POLICY BASIS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Order, we provisionally adopt amendments to the Eligible Resource Portfolio Requirement rule (Chapter 311) that would adopt the use of electricity attribute certificates to satisfy the portfolio requirement. We also include an amendment that clarifies the status of landfill gas as a renewable resource.

II. BACKGROUND

Chapter 311 was among a series of rules that the Commission promulgated prior to March 1, 2000 to implement Maine's Electric Restructuring Act. The rule implements the legislative requirement that all licensed competitive electricity providers (CEPs) satisfy at least 30% of their retail load in Maine through "eligible resources," as defined by statute. 35-A M.R.S.A. § 3210. In developing the rule, the Commission considered whether CEPs should be allowed to demonstrate compliance with the portfolio requirement through the possession of "certificates" or "tradable credits" that represent the attributes of electricity separate from the energy commodity. The Commission decided not to allow for tradable credits due, in part, to the lack of a region-wide system for administration and verification. *Order Provisionally Adopting Rule*, Docket No. 98-619 at 17-18 (Dec. 2, 1998).

Subsequent to the adoption of Chapter 311, NEPOOL began working to develop a tradable attribute certificate system. This system, known as the Generation Information System or GIS, has recently been implemented. The system has been specifically designed to support various public policy initiatives of the New England states, including Maine's eligible resource portfolio requirement.

As a result of the development of the GIS, we initiated an Inquiry on June 4, 2002 (Docket No. 2000-300) to examine whether the use of tradable certificates pursuant to

the GIS should be incorporated into our portfolio requirement rule.¹ We also indicated that the Inquiry would consider other modifications that would improve the operation of the rule. Central Maine Power Company, Bangor Hydro-Electric Company, the Public Advocate, Independent Energy Producers of Maine, Constellation Power Source, Inc., Union of Concerned Scientists, Strategic Energy LLC, Jon Reisman, and Maine Public Service Company provided comments during the Inquiry. Most of the commenters in the Inquiry supported the use of GIS certificates for purposes of demonstrating compliance with the portfolio requirement and no commenter opposed the use of the system.

III. RULEMAKING PROCESS

On September 3, 2002, we issued a Notice of Rulemaking and a proposed rule that would amend Chapter 311 to require the use of GIS certificates for purposes of verifying compliance and to make the rule consistent in other respects with the GIS system. We also proposed to clarify that landfill gas is a renewable resource for purposes of the rule in that it may reasonably be considered a biomass resource.

Consistent with rulemaking procedures, interested persons were provided an opportunity to provide written and oral comments on the proposed rule. Central Maine Power Company (CMP), Bangor Hydro-Electric Company (BHE), Independent Power Producers of Maine (IEPM), and the Public Advocate commented on the proposed rule. These comments are discussed below.

Pursuant to 35-A M.R.S.A. § 3210(3), the eligible portfolio requirement rules are “major substantive rules” as defined and governed by 5 M.R.S.A. §§ 8071-8074. Accordingly, the Commission has “provisionally” adopted the amendments to Chapter 311 and will present the amended rule to the Legislature. The Legislature will review the provisional rule and either authorize its final adoption (by approving it with or without change or by taking no action) or disapprove its adoption. 5 M.R.S.A. § 8072.

IV. DISCUSSION OF PROPOSED AMENDMENTS

A. Overview

As mentioned above, the GIS was specifically designed to facilitate compliance with various public policy initiatives of the several New England states, including Maine’s portfolio requirement. We view the implementation of the GIS as a substantial step in the evolution of competitive electricity markets. The system should allow for the creation of secondary markets for attribute certificates, substantially reduce

¹ The Inquiry also examined whether to incorporate the use of GIS certificates in our uniform information disclosure rule (Chapter 306). We have initiated a rulemaking to consider changes to Chapter 306 in light of the GIS, as well as other modifications to the rule. *Amendments to Information Disclosure Rule*, Docket No. 2002-580.

supplier costs of complying with a variety of differing New England state requirements, and greatly simplify verification efforts.

However, an ongoing dispute over the rights to certain GIS certificates raises a substantial question as to whether we should proceed towards adoption of the GIS. The dispute is over rights to GIS certificates assigned to qualifying facilities (QFs) that have existing power purchase agreements with transmission and distribution (T&D) utilities that predate the implementation of the NEPOOL GIS. The disputed issue is whether the utilities are entitled to both the energy commodity and the “attributes” associated with the QF generation.²

The issue is of importance because the T&D utilities have sold their entitlements to QF power under a 3-year contract that terminates February 2005. During the sale process, representations were made that the QF entitlements could be used to satisfy Maine’s portfolio requirement. In addition, the Commission has accepted the entitlements purchaser’s bidder conditions that contain an explicit Commission finding that the QF entitlements are eligible resources for purposes of the portfolio requirement.³ *Order Designating Standard Offer Provider and Directing Utilities to Enter Entitlements Agreements*, Docket No. 2001-399 (Sept. 18, 2001). Thus, if the utilities are unable to obtain the QF certificates so they could be transferred to the entitlements purchaser, the adoption of the GIS in Maine would frustrate the legitimate expectation of the entitlements purchaser that the entitlements could be used to satisfy the portfolio requirement, and would violate the Commission’s acceptance of the purchaser’s bidder conditions.

Moreover, the issue could continue to have importance subsequent to 2005. To the extent the QF certificates have value in that they satisfy Maine or other state requirements, or can be used to comprise a “green product,” that value would flow to ratepayers as an offset to stranded costs.

The Commission has initiated an Investigation and has tentatively concluded that the utilities have the right to the GIS certificates associated with QF contracts and that the certificates should be transferred to the entitlement purchaser. *Investigation of GIS Certificates Associated with Qualifying Facility Agreements*, Docket No. 2002-506. QFs commented in the Investigation that the matter is a contractual dispute and that the Commission lacks jurisdiction to resolve the matter. The Investigation is pending and the ultimate resolution of the matter (which may involve court proceedings) may not occur for a substantial period of time.

² The dispute involves CMP and BHE. Because the GIS is not applicable in northern Maine, the dispute does not involve Maine Public Service Company (MPS).

³ No party has ever questioned that the QF entitlements may be used to satisfy the portfolio requirement.

To avoid postponing the benefits of the GIS to the participants in Maine's retail electricity market, we have decided to proceed with the adoption of the GIS. We, will, however, provide for an explicit exception that will allow purchasers of the QF entitlements, who do not receive associated GIS certificates, to use the entitlements to satisfy the portfolio requirement (section 5(B)(1)). This will ensure that the legitimate expectations of the current entitlements purchaser are not frustrated and that its bidder conditions are not violated. In addition, the exception will also apply to future entitlements purchasers. This is consistent with our view that one purpose underlying the Legislature's inclusion of QF entitlements as eligible resources under the portfolio requirement statute, 35-A M.R.S.A. § 3210, was to enhance their value, thus reducing the amount of stranded costs to be paid by ratepayers.

B. Verification

We provisionally amend several provisions of Chapter 311 to incorporate the GIS for verifying compliance with the portfolio requirement. The provisional rule adopts the use of GIS certificates as the means of verification for service to customers in the ISO-NE control area, for service beginning January 2002.⁴ However, the rule allows the Commission to accept alternative means of verification under certain circumstances. Specifically, the provisional rule modifies the language of sections 3(A), 4(A), 5(B)-(F) and 6(A) to require that CEPs demonstrate compliance with the rule through GIS certificates for service in the ISO-NE area and to otherwise make the rule consistent with the GIS. We have also included definitions of "GIS," "GIS certificates" and "eligible GIS certificates" in section 2 of the provisional rule.⁵

A regional tradable certificate system works as designed if it is the sole means of verification throughout the region. One of the primary purposes of the GIS is to prevent the double counting of attributes. This purpose is necessarily defeated if other means of verification are allowed. For example, an eligible generator could sell the attributes of the resource to one retail supplier and the energy commodity to another supplier. If alternative means of verification are allowed, there would be a double counting of attributes if both the certificates and the purchase of the energy are used to verify compliance.

Nevertheless, we have allowed for alternative means of verification under limited circumstances. Retail electricity providers in Maine may have reasonably relied on the existing rule by contracting for "eligible" supply prior to the development of the

⁴ Although the GIS was implemented mid-year 2002, the first trading period was for service during first the quarter of 2002.

⁵ The IEPM commented that the definition of "eligible GIS certificates" should be clarified to specify that eligibility refers to Maine's requirements. We have done so in the provisional rule.

GIS.⁶ Accordingly, section 5(B)(1) of the provisional rule allows for exceptions to the GIS verification requirement under such circumstances and for other good cause.

The proposed rule allowed for only a one-year transition period during which alternative verification means could be used. We have removed the specific transition period because suppliers may have entered into multi-year contracts in reliance on the existing rule. However, with the possible exception of QF entitlements purchasers, we expect our authorization of alternative verification means to be rare and to diminish over time as legitimate claims of reliance on prior rules naturally expire. The possible allowance of alternative means of verification in the provisional rule essentially accepts CMP's comment that we indefinitely allow for alternative verification for QF entitlement purchasers, even if some attribute double counting is a result, as well as BHE's suggestion that the rule allow for some flexibility if a provider reasonably acted to comply with Maine's requirement through some other means.

C. Rejection of Certificates

The provisional rule contains a provision (Section 5(I)) that would allow the Commission to reject certain GIS certificates if it finds that the source of the certificates is not an eligible generation facility, that rejection of certificates is necessary to avoid the double-counting of attributes or for other good cause. Under the GIS, generators essentially self-certify that their facilities satisfy a particular state's portfolio requirement. As a result, it is possible that the Commission, upon investigation, may conclude that the source of certain certificates is not an eligible facility under Maine law and, thus, reject the use of the certificates for purposes of Maine's rule. We have also added an explicit provision (Section 5(J)) that the Commission may initiate investigations and obtain information from the generation facilities to verify the accuracy of certification of facilities as "eligible" under Maine's rules.⁷ The provision specifies that the Commission may reject certificates if a generator fails to provide information relevant to its eligibility.⁸

The proposed rule did not specify the double counting of attributes as a possible ground for rejecting certificates. However, there may be circumstances in

⁶ As discussed in section 4(A) above, the current QF entitlements purchaser is such a provider.

⁷ The GIS rules specify that entities subject to "attribute laws" are responsible for demonstrating compliance with such laws and that the GIS administrator, NEPOOL and ISO-NE have no responsibility for ensuring compliance with such laws (GIS Operating Rules 5.3(C)).

⁸ It is possible that an entity may have in good faith purchased certificates designated as eligible for Maine's portfolio requirement without knowing that generator has not cooperated in a Commission investigation pursuant to this rule. In such a circumstance, it is our expectation that we would not reject use of such certificates. We would instead act to invalidate certificates before they could be transferred.

which it would be appropriate for the Commission to reject certificates to avoid the double-counting of electricity attributes. We do not decide now any circumstances in which we would take such action, but the rule provides the Commission with the authority to act to avoid double counting when warranted.

The IEPM commented that the “good cause” provision is too vague and lack of eligibility should be the only valid reason to reject certificates. We disagree. Good cause is a commonly used standard and is the standard generally contained in the waiver provisions of Commission rules (including Chapter 311). Although broad, standards such as “good cause,” “just and reasonable,” and “public interest” have proven workable and are necessary to allow decision makers to consider varied and unforeseen circumstances. The GIS is new, as is the concept of trading electricity attributes separate from the energy commodity. As such, it is impossible to predict all circumstances that could arise in the future that might warrant the rejection of GIS certificates. Although we do expect such circumstances to be rare, it is appropriate for the Commission to have the flexibility to consider future circumstance and to decide issues involving certificate rejection under a good cause standard.

CMP questioned the Commission’s authority to compel information from generating facilities in that they are not regulated by the Commission and suggested that CEPs be required to provide information supporting the eligibility of generation facilities. BHE suggested that the Commission conduct a preliminary review of facilities to determine their eligibility. We decline to adopt either suggestion. Although we do not address at this time our authority to compel supporting information, we believe it likely that generators would provide supporting information rather than risk rejection of certificates for use in Maine. Moreover, we are reluctant before there are any information access problems to impose an obligation on CEPs to contract for the right to obtain generator information when it purchases certificates; such a requirement could be burdensome and would be problematic if the CEP were to purchase certificates from an entity other than the generator. Finally, we see no reason for a “preliminary” review of eligibility, but we do anticipate periodic reviews to ensure that all designations of eligibility for Maine’s portfolio requirement are accurate.

D. Northern Maine

The provisional rule maintains the existing rule’s verification requirements with respect to service in northern Maine. The GIS is only applicable to service in the ISO-NE control area and there is currently no attribute system in northern Maine. We agree with commenters in the Inquiry that, due to the small size of the market, a GIS-type system in northern Maine is likely to be cost-prohibitive. Thus, the provisional rule

contains two verification approaches depending on whether service is provided in the ISO-NE control area or the northern Maine market.⁹

E. Multi-Fuel and Pumped Storage

The provisional rule modifies the provisions of Chapter 311 concerning multi-fuel and pumped storage hydro facilities (sections 4(C) and 4(D)) to specify that such facilities will be treated according to the GIS rules for service in the ISO-NE control area. The provisions remain the same for service in northern Maine. Commenters in the Inquiry stated that the GIS has rules for the treatment of multi-fuel and pumped storage hydro facilities and, as a result, there is no need for the specific provisions in Chapter 311.

The GIS rule assigns certificates to multi-fuel facilities based on the proportion of output per fuel type, while the current Chapter 311 provides that energy may be classified as renewable when generated by a renewable fuel. Thus, the GIS rule appears essentially consistent with the Chapter 311 provision. The GIS provision on pumped storage is inconsistent with the current rule in that the GIS assigns such facilities residual mix certificates,¹⁰ while Chapter 311 classifies facilities as renewable based on the fuel used for pumping. Because the provisions in Chapter 311 are negated by or inconsistent with the GIS rules, we have removed the specific provisions as they relate to service in the NEPOOL control area. No commenter opposed these changes.

F. Physical Deliverability

The statutory provisions governing the portfolio requirement require that a facility generate power that “can physically be delivered” to the applicable control area in order to be classified as an eligible resource. 35-A M.R.S.A. § 3210(2)(B)(1). The current rule (Section 4(B)) implements this provision by requiring that energy used to satisfy the portfolio requirement be recognized pursuant to the rules of the control area as serving load obligations within the region. The provisional rule modifies the provision to incorporate the GIS by specifying that the source of the GIS certificates must be energy that is physically delivered to the ISO-NE control area in that it is recognized as serving load obligations. No commenter opposed these changes to the rule.

⁹ Although the provisional rule contains this dichotomy, the 30% portfolio requirement would remain a statewide obligation as contemplated in 35-A M.R.S.A. § 3210. Therefore, CEPs must have GIS certificates for service in the ISO-NE area or entitlements to eligible resources for service in northern Maine that in combination amount to 30% of total sales within the State. There is no obligation for CEPs to separately satisfy the 30% portfolio requirement within the two Maine regions.

¹⁰ Residual mix certificates are assigned to the excess of energy used for pumping over energy generated by the facility.

G. Landfill Gas

As part of the process of implementing Chapter 311, our Staff has had several inquiries as to whether energy generated from landfill gas can be considered renewable for purposes of satisfying Maine's portfolio requirement. Staff has provided an informal opinion that landfill gas, which is the byproduct of the decomposition of organic material, can be considered biomass for purposes of the portfolio requirement. Commenters in the Inquiry agreed that landfill gas should qualify as renewable for Maine's portfolio requirement. We have thus modified section 4(A)(1) of the provisional rule to specify that biomass includes landfill gas.

H. Annual Reports

The IEPM commented that the current rule's May 1 annual report deadline (Section 5(D)) is unworkable in conjunction with GIS, because the trading period for the last quarter of the year does not close until June 15th of the following year. The IEPM states that Massachusetts has adopted a July 1 reporting deadline and recommends that Maine also use a July 1 deadline. We agree and have modified the rule accordingly.

The IEPM also commented that the provision requiring officer certification of CEP annual reports (Section 5(E)) should be modified to clarify that resources used to satisfy Maine's portfolio requirement are not also used to satisfy "any load" obligations in other states. We have made the clarifying change to the rule.

Accordingly, we

O R D E R

1. That the attached amendments to Chapter 311, Eligible Resource Portfolio Requirement, are hereby provisionally adopted;
2. That the Administrative Director shall submit the provisionally adopted amendments and related materials to the Legislature for review and authorization for final adoption;
3. That the Administrative Director shall file the provisionally adopted amendments and related materials with the Secretary of State;
4. That the Administrative Director shall notify the following of the provisional adoption of the attached rule:
 - a. All electric utilities in the State;

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.